Supreme Court, U.S.
FILED

981207 JAN 27 1999

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PATRICIA A. TURNER, - - - - *Petitioner,*

versus

RICHARD A. FREY, JR., Et Al., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THEODORE H. AMSHOFF, JR.
Counsel of Record for Petitioner
PAUL P. CLEMENS
AMSHOFF & AMSHOFF, P.S.C.
Ninth Floor
200 West Broadway
Louisville, Kentucky 40202
Phone: (502) 540-0060
Counsel for Petitioner

January 27, 1999

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

95RP

QUESTIONS PRESENTED FOR REVIEW

1. Does the evidence present disputed issues of material fact?

2. Has the Plaintiff alleged physical abuse?

3. Did the trial court improperly assign the burden of proof?

4. Can a single incident or occurrence show a custom or practice?

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998
No. _____

Patricia A. Turner, Petitioner
v.
Richard A. Frey, Jr., et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Patricia A. Turner, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 29, 1998.

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix B) was entered on October 29, 1998.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 29, 1998. (See Appendix B) The Order denying Plaintiff's motion for reconsideration was entered on June 3, 1997. (See Appendix C) The Memorandum Opinion and Order was entered February 27, 1997. (See Appendix D)

PARTIES

Patricia A. Turner, Administratrix of the Estate of Stanley R. Shepherd, Plaintiff.

Richard A. Frey, Jr.; Donald Copple; Derek Browning; Ezell Smith; Harold Adams; Michael Durham; Dale Cornatzer; Metropolitan Department of Corrections; Darryl T. Owens; Chris Gorman; Irvin G. Maze; David L. Armstrong, Jr.; Jefferson County Fiscal Court; and Doe Defendants, Respondents

TABLE OF CONTENTS

Questions Presented for Review i

Opinion Below ii

Jurisdiction iii

Parties iii

Table of Contents iv

Table of Cases vi

Table of Statutes ix

Table of Rules x

Table of Other Authorities xi

Statutes Involved 1

Statement of the Case 1

Reasons for Granting the Writ 3

I. Plaintiff Has Alleged Physical Abuse 3

II. There Are Disputed Issues of Material Fact 5

III. The Court Improperly Assigned The Burden of Proof 16

IV. A Single Incident Can Show A Practice or Custom 21

Conclusion 29

Appendix 1a

TABLE OF CASES

Ancata v. Prison Health Services, Inc.,
769 F. 2d 700 (11th Cir. 1985) 23

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 246 (1986). 5

Anderson v. Atlanta, 778 F. 2d 678 (11th Cir. 1985) . . . 23

Barber v. City of Salem, 953 F. 2d 232, 235
(6th Cir. 1992) 10

Boretti v. Wiscomb, 930 F. 2d 1150 (6th Cir. 1991). 6

Campbell v. U.S., 365 U.S. 85 (1961) 19

Crull v. GEM Ins. Co., 58 F.3d 1386 (9th Cir. 1995). 5

Estelle v. Gamble, 429 U.S. 97 (1976) 9, 10, 11, 13

Farmer v. Brenhan, 114 S. Ct. 1970 (1994) 12, 28

Gant v. Aliquippa Borough,
612 F. Supp. 1139 (W.D. Pa. 1985) 24

Garcia v. Salt Lake County,
768 F. 2d 303 (10th Cir. 1985). 24

Graves v. U.S., 150 U.S. 118 (1893) 20

Greenleaf v. Birth, 31 U.S. 292 (1832). 20

Hays v. Jefferson County, Kentucky,
668 F. 2d 869, 874 (6th Cir. 1982). 14

Herrera v. Valentine, 653 F. 2d 1220 (8th Cir. 1981) . . . 23

Hill v. Marinelli, 555 F. Supp. 413 (N.D. Ill. 1982) 23

Hudson v. McMillan, 112 S. Ct. 995 (1992). 8

Kibbe v. City of Springfield, 777 F. 2d 806. 24

Larez v. City of Los Angeles,
946 F. 2d 630 (9th Cir. 1991) 25

Leite v. City of Providence,
463 F. Supp. 585 (D. R.I. 1978) 27

McKinney v. Compton, 888 F. Supp. 75
(W.D. Tenn. 1995) 10

Monell v. New York Department of Social Services,
436 U.S. 658 (1978). 13

Newman v. Zinn, 164 F.2d 558 (3d Cir. 1947). 4

Roberts v. City of Troy,
773 F. 2d 720, 723 (6th Cir. 1985) 10

Runkle v. Burnham, 153 U.S. 216 (1894) 20

Rymer v. Davis, 775 F. 2d 756 (6th Cir. 1985) 24

Scheuer v. Rhodes, 416 U.S. 232 (1974) 3

Selma, Rome and Dalton Railroad Co.,
139 U.S. 560 (1887) 19

Strauss v. Chicago, 760 F. 2d 765 (7th Cir. 1985) 22

Taylor v. Stenet, 532 F. 2d 462 (5th Cir. 1976). 10

United States v. Denver and Rio Grande Railroad Co., 191 U.S. 84 (1903) 19

United States v. New York, New Haven and Hartford Railroad Co., 355 U.S. 253 (1957) 19

TABLE OF STATUTES

28 U.S.C. § 1254. iii

42 U.S.C. § 1983 ..... 1, 13, 14, 20, 27

§300.57 14

TABLE OF RULES

Rule 8, F.R.C.P. 4

Rule 15(a), F.R.C.P. 4

TABLE OF OTHER AUTHORITIES

1 J. Cook and J. Sobieski, *supra* at ¶2.05 [B][7] n. 177. . . . . 24, 25

Wright, Miller & Kane, Fed. Prac. & Proc. § 2722 at n.5 (1983) 4

31A C.J.S. *Evidence* §127 at n. 27, §129 at nn. 49-54 (1996). 18

STATUTES INVOLVED

Rule 56(c).

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case arises out of a Complaint filed by the Petitioner, Patricia A. Turner as Administratrix of the Estate of Stanley R. Shepherd, in the United States District Court for the Western District of Kentucky, Louisville Division, on August 15, 1991, pursuant to 42 U.S.C. § 1983, seeking monetary damages for the wrongful death of the decedent.

On September 4, 1991 and September 5, 1991, Respondents filed their Answer. On December 4, 1996, Respondents filed a Motion for Summary Judgment. The Court granted Respondents' Motion for Summary Judgment by a Memorandum Opinion and Order dated February 27, 1997; *see*, Appendix D.

Petitioner filed a timely appeal with the United States Court of Appeals for the Sixth Circuit, which denied the appeal

by Order dated October 29, 1998; *see*, Appendix B. This Petition followed.

Stanley Shepherd was arrested on August 17, 1990 at 4:45 p.m. by the Louisville Police and charged with the theft of merchandise valued at $2.10. Because he was unable to post bond, Shepherd was incarcerated overnight at the Jefferson County Jail.

For reasons which are not entirely clear, jail personnel "four-pointed" Shepherd; i.e., handcuffed Shepherd to his bunk in a supine position (on his back). At some point during the night, he developed a nosebleed. The reasons for Shepherd's nosebleed were never satisfactorily resolved. Respondents claimed that Shepherd had been "picking his nose." Petitioner alleged, based on the available evidence, that jail guards had caused the nosebleed by striking Shepherd in the face.

When jail guards came to take Shepherd to jail the following morning, they found him dead, having apparently choked to death on his own blood and vomitus.

REASONS FOR GRANTING THE WRIT

I. PLAINTIFF HAS ALLEGED PHYSICAL ABUSE.

The trial Judge, Honorable John Dixon summarily dismissed Plaintiff's allegations of physical abuse in a single footnote. Judge Dixon declined to consider the allegations of physical abuse because, in his view, the Complaint did not adequately allege this theory of recovery. The Sixth Circuit summarily dismissed this argument with the comment that it was "irrelevant." Opinion at 8-9.

Judge Dixon and the Sixth Circuit are mistaken for three reasons. First, the Plaintiff has reasonably alleged physical abuse. Plaintiff alleged in ¶ 15 of her Complaint:

> The actions of the Defendants resulted in the unnecessary and wanton infliction of pain upon Stanley Shepherd prior to his death.

In testing the sufficiency of a complaint, the complaint must be liberally construed in favor of the pleader, and with every intendment in his favor. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Under this liberal standard, the foregoing language may

reasonably be construed as alleging the physical abuse of the decedent.

Second, assuming *arguendo* that Plaintiff failed to sufficiently allege physical abuse, she should have been granted leave to amend her pleading, to conform to the proof. Rule 15(a), F.R.C.P. (leave to amend shall be freely given when justice so requires). A plaintiff is not bound by the theory of his pleading; he may offer his proof and conform his pleadings to the proof offered when presentation of the merits of his action will be subserved thereby. *Newman v. Zinn,* 164 F.2d 558 (3d Cir. 1947); Wright, Miller & Kane, Fed. Prac. & Proc. § 2722 at n.5 (1983).

Third, the court should not have limited the Plaintiff to the theories of recovery set out in her Complaint.

The pleadings need only identify the basis of the court's jurisdiction, demand for judgment for the relief sought and contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8, F.R.C.P.

The pleadings need not identify any particular legal theory under which recovery is sought. *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

A similar rule must govern the case at bar. The evidence in the instant case clearly raises disputed issues of material fact. Plaintiff should not lose her cause of action merely because her attorneys failed to set out one theory of recovery with sufficient particularity.

II. THERE ARE DISPUTED ISSUES OF MATERIAL FACT.

Summary judgment was not warranted in the instant case because there were many disputed issues of material fact. Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986).

The Sixth Circuit opined that Plaintiff has "fail[ed] to present facts which would give rise to the 'deliberate indifference' required of prison officials. Opinion at 5. Respectfully, Petitioner insists that the Sixth Circuit is mistaken.

ASSAULT AND BATTERY

In the case at bar, a rational trier of fact obviously could have found for the plaintiff. A jury could reasonably have concluded that Stanley Shepherd was assaulted and battered. The bruises on Shepherd's nose were noted by the coroner four hours after death. Similarly, a paramedic at 8:49 a.m. on the morning of death observed these bruises, and immediately concluded that they had been caused by some direct trauma. The Chief Medical Examiner in Jefferson County, Dr. L. C. McCloud, stated that the probable etiology of the bruise was a blow to the nose. To overcome a summary judgment motion only requires that there be a reasonable possibility that the wound was caused by a blow. *See, Boretti v. Wiscomb*, 930 F. 2d 1150 (6th Cir. 1991).

The credibility of witnesses is extremely important in resolving contested issues of fact. In the instant case, a number of witnesses claimed that the decedent's nose bleed had been caused by Shepherd's picking his nose (*see* Norine Ahart, etc.). Other witnesses, however, claimed that Shepherd's injuries had resulted from a fall (*see* Harold Adams). A trier of fact could reasonably have concluded that the explanation of "picking the nose" was a *post hoc* attempt to conceal what had actually occurred; the witnesses' credibility, therefore, was extremely important.

FAILURE TO MONITOR

A reasonable jury might also have concluded that Shepherd was not properly monitored and that he had in fact been effectively ignored in his *extremis*, as evidenced by the *dried* vomitus found in his hair by the EMS technician. A jury might reasonably have concluded that the Defendants had been clearly indifferent to Shepherd.

POSITION OF THE BODY

In deposing Dr. L.C. McCloud, Respondent's counsel established that some of the physical evidence indicated Shepherd had been four pointed face-first. Whether Shepherd was placed face-up or face-down could well have been determinative, under the deliberate indifference standard of the Eighth Amendment. Face-down would not have created the substantial risk that was created by four-pointing in the supine position. Although several witnesses indicated that Shepherd was four pointed on his back, this critical discrepancy was never satisfactorily explained.

CRUEL AND UNUSUAL PUNISHMENT

It is well settled that the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment and is forbidden by the Eighth Amendment. *Hudson v. McMillan*, 112 S. Ct. 995, 998 (1992). The core inquiry is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm. *Id.* at

999.

Much of the factual evidence indicates an assault and battery. This includes both the physical evidence and the testimony of medical experts. Dr. McCloud stated that Shepherd probably did receive trauma to his nose, and that his injuries were medically consistent with a blow to the face. Paramedic Schiess agreed with this assessment. Whether such a blow was actually inflicted by the Defendants is a disputed issue of material fact.

DELIBERATE INDIFFERENCE

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court held that certain "elementary principles" establish the "government's obligation to provide medical care for those whom it is punishing by incarceration." The Eighth Amendment's proscription of cruel and unusual punishment prohibits prison authorities from displaying deliberate indifference to serious medical needs, because such indifference constitutes the unnecessary and wanton infliction of pain.

McKinney v. Compton, 888 F. Supp. 75 (W.D. Tenn. 1995). A pretrial detainee may not enjoy the protections of the Eighth Amendment, *Barber v. City of Salem*, 953 F. 2d 232, 235 (6th Cir. 1992), but the Due Process clause of the Fourteenth Amendment affords them protections analogous to the Eighth Amendment rights of prisoners. *Roberts v. City of Troy*, 773 F. 2d 720, 723 (6th Cir. 1985). Although Shepherd was a pretrial detainee and thus was not being punished, Jefferson County still had the same obligations; in fact, it may have had even greater obligations to a pretrial detainee; *see, Taylor v. Stenet*, 532 F. 2d 462 (5th Cir. 1976).

A person who is in confinement obviously must rely upon the authorities to treat his medical needs. As this Court noted, "if the authorities fail to do so, those needs will not be met." *Estelle.* The *Estelle* court concluded that deliberate indifference to serious medical needs constitutes the "unnecessary and wanton infliction of pain." It added:

[t]his is true whether the indifference is manifested by

> prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care.

Id. at 104.

The Sixth Circuit held that:

> "there is no reason to think that the guards were indifferent to the serious medical needs of the prisoner as required by *Estelle v. Gamble*."

Opinion at 6-7. Again, the Sixth Circuit has misread the holding on which it relies.

A claim is properly stated when a prisoner alleges acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Id.* In the instant case, a jury could have reasonably concluded that finding a prisoner in an unexplained pool of blood, with his nose packed, and four pointed in a supine position, indicated deliberate indifference to serious medical needs, if the Defendants were aware of the danger. The evidence in this case clearly shows that all of the prison officers involved were well aware of the danger.

Furthermore, there was ample evidence that Stanley Shepherd had attempted to obtain assistance, and that his cries for help were ignored by both the guards and the medical staff. A number of inmates who were interviewed as part of the Corpse Investigation stated that they had heard Stanley Shepherd rattling his chains for a long period of time.

A reasonable jury could have concluded that the defendants ought to have realized that this was a desperate plea for help. If a risk is so obvious that a reasonable man would be bound to realize it, jurors may infer that the defendants did, in fact, realize the danger. *Farmer v. Brenhan*, 114 S. Ct. 1970, 1981 (1994). An official is deliberately indifferent when he knows of an excessive risk to a detainee's health or safety and disregards it. *Id.* Moreover, qualified immunity does not allow officers to ignore such health needs. A reasonable jail guard should clearly realize the danger of chaining a prisoner who is bleeding from the nose, on his back. A reasonable jail guard should also realize the danger of ignoring a prisoner's plea for

help, especially when the jail has an obligation to provide the inmate with medical care. *See Estelle.*

THE FOUR POINT POLICY

42 U.S.C.A. §1983 imposes liability on any person who deprives another of his federally protected rights. Jefferson County and its jailer, Richard Frey, Jr., are liable if the execution of a county policy or custom - whether promulgated by its law-makers or by those whose edicts or acts may fairly be said to represent official policy - inflicts an injury that deprives another of his federally protected rights. *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

Jefferson County and Frey have adopted a policy and custom concerning the four pointing of prisoners. The policy, numbered Policy 10.20, states that:

> [t]he officer must exercise good judgment in handcuffing and restraining prisoners. When and by what means an inmate should be restrained is left to the officer since he is in the best position to judge what measures are necessary to control the inmate. The officer can be held for gross negligence if he/she fails to exercise good judgment....Handcuffing and

> restraining are specialized and technical skills that are best acquired through practical application and experience.

While Policy 10.20 concerns the application of restraint generally, Standard Operating Procedure §300.57 concerns four point restraints in particular. It states:

> 3. The inmate will be placed on the bunk in a prone position on his stomach, with his head toward the foot of the bunk.

These policies are obviously drafted in a gross and reckless manner, since injury to a patient bleeding nasally is readily foreseeable. The officers should have been aware of the extreme danger in four pointing a profusely bleeding prisoner; however, the county should have foreseen and averted this problem. When a county implements or executes a policy or custom which it either knows or should have known violates the constitutional rights of citizens, the county is liable under §1983, and its action is akin to gross *negligence*. *Hays v. Jefferson County, Kentucky*, 668 F. 2d 869, 874 (6th Cir. 1982).

The Sixth Circuit summarily dismissed this argument

with the terse comment that medical personnel had requested that Shepherd be four-pointed. This assertion completely ignores the dispositive fact that jail guards should not have four-pointed Shepherd on his back.

CONCEALMENT OF EVIDENCE

If Shepherd were, in fact, clothed at 6:48 a.m. (as the County has alleged), his clothes had obviously been removed before the paramedics arrived. A jury could reasonably have concluded his clothes were removed to conceal the quantity of blood released. If the jail guards found that Shepherd's gown were completely blood-soaked, and still refused to help him, this would certainly be strong evidence of their indifference. Shepherd could not have removed the gown himself, because Nurse Swindler testified that at 8:45 a.m. she saw Shepherd with both his hands and feet cuffed and that he was completely nude. These factual questions should have been resolved by a jury.

Nurse Swindler provided further evidence that indicates

the removal and concealment of substantial blood from the person of Shepherd. She testified that at 8:45 a.m. Shepherd was "clean all over" and that he had no blood at all on his body. Not more than ten minutes later, however, Deborah Schiess saw something completely different: she saw bloody vomitus on Shepherd's neck and in his hair, along with dried blood on both his right and left anterior shoulders. The credibility of these witnesses was an essential question in resolving this case.

III. THE COURT IMPROPERLY ASSIGNED THE BURDEN OF PROOF.

Judge Dixon evidently agreed that there are still disputed issues of material fact. He believed, however, that the Plaintiff still could not prevail, for two reasons: (1) because Plaintiff had not met her burden of proof, and (2) because Plaintiff had only alleged a single incident of misconduct. Judge Dixon is mistaken both counts.

First, Plaintiff contended that the County had implemented an unconstitutional policy and that it had failed to

adequately train its corrections officers. The Court below improperly assigned the burden of proof on these issues to the Plaintiff. Judge Dixon stated:

> Further, defendants (sic) have demonstrated a lack of evidence to support plaintiff's contention that defendant Frey failed to properly set policy and failed to supervise or train the corrections officers and medical personnel... The burden passed to plaintiff to establish the existence of a disputed fact essential to these issues. However, plaintiff failed to demonstrate the existence of a disputed fact on these issues.

Opinion at 20-21.

Respectfully, Plaintiff insists that such is simply not the law, and that the trial Court misconceived the law on this point. As this Court will note, Judge Dixon required the Plaintiff to prove the existence of a negative, namely, that the County did not adequately train and supervise its corrections employees. Moreover, the evidence on this point was necessarily within the sole control of the Defendants, and not available to the Plaintiff. Under such circumstances, the burden of proof shifts to the party having control of all the evidence.

As the treatise Corpus Juris Secundum explains this rule:

> The party whose contention requires proof of a negative fact generally has the burden of evidence to prove that fact, except as the rule may be modified by the fact... that the evidence as to such issue is peculiarly within the adverse party's knowledge or control...
>
> Ordinarily, a party does not have the burden of establishing facts peculiarly within the knowledge of his adversary.
>
> In the administration of justice, it is desirable that the burden of proof and the burden of producing evidence be placed on the party best able to sustain it, and there is authority for the view that the burden of proof and the burden of evidence as to an issue rests on the party having the greater means of knowledge. A narrower formulation is that where the evidence as to an issue is peculiarly within the knowledge and control of a party, the burden of proof or the burden of evidence as to such issue rests on him.
>
> It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control of evidence as to such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disproved by the party having such knowledge or control.

31A C.J.S. *Evidence* §127 at n. 27, §129 at nn. 49-54 (1996).

As authority on this point, the treatise authors cited (among others) *Campbell v. U.S.*, 365 U.S. 85 (1961)(per Brennan, J), in which this Court stated:

> ...the ordinary rule, based on the considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.

Campbell, 365 U.S. at 96.

In support of this assertion, Justice Brennan cited his earlier holding *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253 (1957):

> Such information is peculiarly within the knowledge of the Plaintiff. The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.

U.S. v. N.Y., N.H. and H.R. Co., 355 U.S. at 256 n. 5.

In support of this statement, Justice Brennan cited the Court's earlier holding *United States v. Denver and Rio Grande Railroad Co.*, 191 U.S. 84 (1903) and *Selma, Rome and Dalton Railroad Co.*, 139 U.S. 560 (1887).

Other cases so holding include *Runkle v. Burnham*, 153 U.S. 216, 228 (1894); *Graves v. U.S.*, 150 U.S. 118, 123-25 (1893); *Greenleaf v. Birth*, 31 U.S. 292, 312 (per Story, J.), 315(Marshall, C.J., dissenting) (1832).

Applying this rule to the case at bar, it is obvious that the Plaintiff, in order to establish her case, must prove a negative fact, namely, that Jefferson County did not properly train and supervise its corrections employees. It is equally clear that the evidence needed to prove or disprove this contention lies wholly within the control of the Defendants.

Requiring the Plaintiff to prove the negative - that the County failed to properly train and supervise - casts upon her an impossible burden. The County, on the other hand, could readily have come forward with proof that the converse was true - if such proof, in fact, existed. In cases such as this, assigning the burden of proof to the plaintiff is tantamount to a rule that the municipality shall always prevail in §1983 actions. Such was surely not the Congressional intent.

Under the foregoing rule, therefore, the burden of proof shifts to the County, which has the means of proof within its sole possession. Judge Dixon, however, did not so apply the law. He held, rather, that the burden of proof lay with the Plaintiff. Since she did not prove her negative averment (because her adversary controlled the sole means of doing so), Judge Dixon granted summary judgment against her.

The Sixth Circuit, for its part, completely ignored this issue, although it was properly presented in Petitioner's Brief. Such was reversible error, and this Court must so hold.

IV. A SINGLE INCIDENT CAN SHOW A PRACTICE OR CUSTOM.

Furthermore, Judge Dixon erroneously held that a single incident is not sufficient to establish a municipal policy or custom. Opinion, at 23. for its part, the Sixth Circuit dismissed this argument with the offhand comment that "it would be a stretch to believe that there was a policy or custom of deliberate indifference." In so holding, that court ignored a large body of

evidence to the contrary.

In its opinion, the trial court relied primarily on *Strauss v. Chicago*, 760 F. 2d 765 (7th Cir. 1985). *Strauss* is readily distinguishable, since that case arose on facts vastly different from those of the instant action.

As this Court will note, *Strauss* had alleged only that a police officer had struck him in the face. This is vastly different from chaining an obviously sick prisoner down, and allowing him to choke to death on his own blood and vomitus. Moreover, the *Strauss* court itself stated that if a single act is "sufficiently egregious," then that injury alone will show an established custom or policy. *Strauss*, 760 F. Supp. at 769.

It is difficult to imagine conduct more egregious than that alleged in the instant Complaint. In our enlightened age which has proscribed torture, death is the ultimate sanction which may be imposed. Even then, the state may not execute a prisoner by rendering him powerless and allowing him to slowly choke to death on his own blood and vomitus. Yet this is the

penalty which Jefferson County inflicted on Stanley Shepherd for the alleged theft of $2.10 worth of merchandise, a crime of which he stood unconvicted.

Other courts have required much less to establish gross negligence. The New York court inferred gross negligence from the fact that *Ruperto* was not provided with food and water, or a mattress, for two and a half days. *Hodge, supra*, 739 F. Supp. at 879. These deprivations, while uncomfortable, were far less than fatal. Plaintiff reiterates, if the County's treatment of Stanley Shepherd was not sufficiently egregious to constitute neglect and indifference, it appears extremely doubtful that any police misconduct could ever rise to that level.

Moreover, other courts have uniformly held that a single incident of withholding medical treatment establishes a policy or custom. *Anderson v. Atlanta*, 778 F. 2d 678 (11th Cir. 1985); *Herrera v. Valentine*, 653 F. 2d 1220 (8th Cir. 1981); *Hill v. Marinelli*, 555 F. Supp. 413 (N.D. Ill. 1982); *Ancata v. Prison Health Services, Inc.*, 769 F. 2d 700 (11th Cir. 1985) (county

liable for inadequate medical treatment provided to prisoner by private contractor); *Gant v. Aliquippa Borough*, 612 F. Supp. 1139 (W.D. Pa. 1985); *Rymer v. Davis*, 775 F. 2d 756 (6th Cir. 1985) (construing Kentucky law); *Garcia v. Salt Lake County*, 768 F. 2d 303 (10th Cir. 1985).

Extensive research has not disclosed a single reported case in which the death of a prisoner due to inadequate medical treatment failed to satisfy the requirement of deliberate indifference and thus to impose municipal liability for an isolated incident.

One of the circumstances in which sufficient additional evidence has been found to impose municipal liability is when the single incident involves a number of municipal employees. This tends to show, of course, that all of the employees involved so understood the municipal policy or custom. *Kibbe v. City of Springfield*, 777 F. 2d at 806; 1 J. Cook and J. Sobieski, Civil Rights Actions, ¶2.05[B][7] at n. 176 (1996).

Another circumstance from which such additional

evidence may be found is where there are no reprimands, no discharges, no admissions of error. Such post-incident indifference is highly significant.

> If (an) episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do... was not acceptable to the police chief, changes would have been made.
>
> This reaction to so gross an abuse (of the Plaintiff's rights) says more about the existing disposition of the City's policymaker than would a dozen (similar) incidents...

Grandstaff, 767 F. 2d at 171; *see Bordanero, supra*, 871 F. 2d at 1166-67; *Larez v. City of Los Angeles*, 946 F. 2d 630 (9th Cir. 1991); *Foley, Hegarty, supra*; 1 J. Cook and J. Sobieski, *supra* at ¶2.05 [B][7] n. 177.

Applying these rules to the case at bar, it is clear that the instant action falls squarely within their coverage. Plaintiff has alleged, not "a single isolated incident," but a series of incidents

extending over at least fourteen hours, which culminated in the wrongful death of Stanley Shepherd. Those incidents involved a number of corrections personnel, including Officer Ezell Smith, Officer Zeke Cannon, Sgt. Donald Copple, Officer Derek Browning, Officer Mike Durham, Officer Harold Adams, Sgt. Ed Johnson and Officer Cornatzer. The fact that all of these officers followed identical procedures over the space of fourteen hours tends to show that there was, in fact, a municipal policy or custom which was well-recognized by all of these corrections officers.

Moreover, there have been no "reprimands, discharges, or admissions of error." Indeed, the Defendants with one voice continue to insist that they have done nothing wrong. Opinion at 9 - 11 Judge Dixon stated that there was no evidence that the County and Director Frey "either condoned, encouraged or knowingly acquiesced in" the conduct of their employees. Respectfully, Plaintiff insists that the evidence of such knowing acquiescence is both clear and plentiful. The County's post-

event callousness speaks volumes, and "says far more about the existing disposition of the County's policymakers than would a dozen similar incidents."

Judge Dixon held that "a single isolated incident," no matter how egregious, cannot form he basis of municipal liability; indeed, it does not even entitle the Plaintiff to a jury trial. Respectfully, Plaintiff inquires, where then is the threshold? How many prisoners must die unconvicted for the supposed theft of $2.10?

Will the County be liable for the second death? The fifth? The tenth? Surely this cannot be the correct rule. "The City's citizens do not have to endure a 'pattern' of police misconduct before they can sue the City under §1983." *Leite v. City of Providence*, 463 F. Supp. 585, 590 (D. R.I. 1978).

The County is fairly considered to have actual or imputed knowledge of the almost inevitable consequences of its corrections policies. Granted, that officers Copple, Browning, Durham, Adams, Cornatzer and Smith were not trained medical

personnel, and that they should not ordinarily second guess the medical staff. Still it did not require medical training for these officers to realize that a prisoner lying on his back, helpless, vomiting and bleeding profusely from the nose, would probably choke to death.

Respondents have argued, and the Sixth Circuit implicitly held, that only the medical staff caused Stanley Shepherd's death. Petitioner replies that it was corrections personnel - these Respondents - and not the medical staff, who chained Stanley Shepherd to his bunk and cleaned the floor with a towel while he strangled on his own blood.

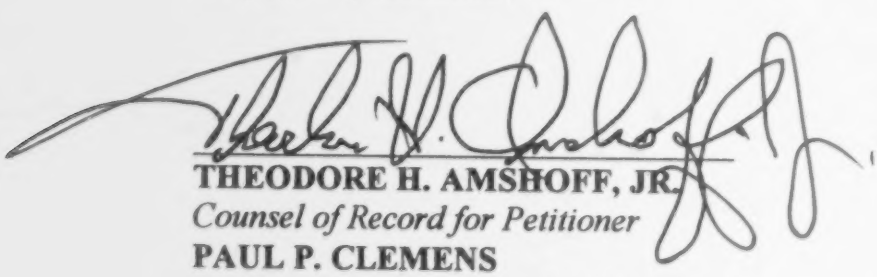
That Stanley Shepherd would choke to death under these circumstances was reasonably foreseeable; indeed, it was readily predictable. A person is presumed to have reasonably intended the logical consequences of his actions. If a risk is so obvious that a reasonable man would be bound to realize it, the court must infer that the Defendant did, in fact, realize it. *Farmer v. Brenhan*, 114 S. Ct. 1970, 1981 (1994).

Common humanity dictates that the Respondents ought to be held accountable for causing the death of Stanley R. Shepherd; and Petitioner urges this Court to so hold.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



THEODORE H. AMSHOFF, JR.
Counsel of Record for Petitioner
PAUL P. CLEMENS
AMSHOFF & AMSHOFF, P.S.C.
200 West Broadway, Ninth Floor
Louisville, Kentucky 40202
(502) 540-0060
Counsel for Petitioner